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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

NO. 855

NATIONAL LATEX PRODUCTS COMPANY and THE AKRON PRESFORM MOLD COMPANY,
Petitioners,

v.

THE SUN RUBBER COMPANY, Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER J. BLENKO
1319 Farmers Bank Building
Pittsburgh 22, Pennsylvania
Attorney for Petitioners

WM. C. McCOY
WM. C. McCOY, JR.
ALBERT H. OLDHAM
FREDERICK B. ZIESENHEIM
Of Counsel

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioners, National Latex Products Company and The Akron Presform Mold Company, defendants-appellants below, pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court herein.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 274 F.2d 224.* Chief Judge McAllister's dissenting

* This report differs from the Opinion of the Court of Appeals on file in the clerk's office in material respects. The Opinion which is on file in the clerk's office is reproduced in the appendix to this petition.

opinion commences at page 215. A Memorandum on Petition for Rehearing is reported at 274 F.2d 246. An Order, not yet reported, was filed March 10, 1960, denying petitioners' motion that the appeals be reheard by the Court *en banc* and that the motion itself be passed upon by the Court *en banc* and also denying a further Petition for Rehearing subjoined to the motion. A further Order, not yet reported, was filed April 6, 1960, granting a stay of the mandate and further interpreting the Order filed March 10, 1960.

For convenience, the appendix to this petition, containing the several opinions of the Court of Appeals, is separately presented.

The opinion of the trial judge is reported at 159 F. Supp. 661 and is also included in the appendix to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1959. A petition for rehearing, filed November 16, 1959, was denied January 13, 1960. A second petition for rehearing and a motion that the appeals, as well as the motion, be considered by the court *en banc* were filed February 2, 1960, were entertained and were denied March 10, 1960. This Court has jurisdiction by virtue of the provisions of 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. May a Court of Appeals judge, who sat on the original hearing of an appeal but who retired prior to the filing of a motion requesting a rehearing *en banc* (*Western Pacific Railroad Case*, 345 U.S. 247), deny the

*Questions Presented.*

motion on behalf of the Court as constituted when the motion was filed?

2. May a Court of Appeals indiscriminately curtail the use of the *en banc* power conferred upon it by 28 U.S.C. 46(c) by establishing an invariable rule that, where a case has been heard and decided by a regular division of three judges, no petition to rehear and reconsider will be considered by the Court *en banc* nor will the appeal ever be reheard by the Court *en banc*?

3. Do findings of fact as to the commercial accomplishments of a patentee, appearing in the opinion of the trial judge, preclude the Court of Appeals from applying the criteria of invention stated in *A. & P. v. Supermarket*, 340 U.S. 147?

4. Does a patentee meet the criteria of patentable invention stated in *A. & P. v. Supermarket*, 340 U.S. 147, where he has done no more than to shape an old material (in this case a synthetic rubber-like "plastic") by old manipulative steps to produce an old article of commerce (in this case a child's rubber-like toy or playball), albeit with an advantageous reduction in manufacturing time and cost; is the attainment of mere commercial advantages, such as manufacturing economies and reduced scrap loss, a "new result" within the meaning of the *A. & P.* case?

5. Do the provisions of 35 U.S.C. 102(b) and 103 impose any higher or diffierent requirements for disclosure on a prior art foreign patent than on a prior art domestic patent?

6. Is it violative of due process for a Court of Appeals, in passing upon the validity of a patent, to cite

in its opinion, *sua sponte*, a trade magazine which is not of record in the case, hold that what is asserted therein constitutes "evidence of invention" and "one of the strongest indicia of invention", and sustain the validity of the patent on the basis thereof?

## CONSTITUTIONAL PROVISIONS INVOLVED

### Article 1, Section 8

The Congress shall have Power

* * * * * *

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

* * * * * *

### Amendment V

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

## STATUTES INVOLVED

### Title 28 U.S.C. 46(c)

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

**Title 35 U.S.C. 102(b)**

A person shall be entitled to a patent unless—

* * * * * * *

(b) the invention was patented or described in a printed publication in this or a foreign country * * * more than one year prior to the date of the application for patent in the United States,

* * * * * * *

**Title 35 U.S.C. 103**

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. * * *

## STATEMENT OF THE CASE

1.

Two actions for patent infringement were commenced by respondent Sun Rubber in the Northern District of Ohio, one against petitioner National Latex and the other against petitioner Akron Presform, charging infringement of Molitor Patent 2,629,134 and Martin et al. patent 2,629,131.*

* Petitioners have filed copies of the appendices filed by all parties below as part of the transcript herein; Rule 21(3). The Molitor patent appears at page 21a and the Martin et al. patent at page 27a.

The Molitor patent is for a method of casting hollow articles such as doll's heads or children's toys from an old synthetic "plastic" called vinyl resin. The Martin patent is for a fully automatic machine for casting hollow articles from any of a wide variety of plastics, vinyl resin included.

Infringement of both patents by Akron Presform was charged by reason of its manufacture and sale of machines for making a wide variety of products such as children's playballs. Infringement of both patents by National Latex was charged by reason of its manufacture of playballs out of vinyl resin in a machine supplied by Akron Presform.

The cases were consolidated and tried together before Chief Judge Jones. He found both patents valid and infringed by both petitioners.

The appeals were heard by a division of the Sixth Circuit Court of Appeals consisting of Circuit Judges Allen and McAllister and District Judge Mathes, sitting by assignment from the Southern District of California. Judge Allen retired on October 5, 1959. The decision filed October 28, 1959 by a divided court, was that Molitor was valid and had been infringed by both petitioners and that Martin was valid but had not been infringed by either of them. All further proceedings below were accordingly concerned only with Molitor; *Electrical Fittings Corp. v. Thomas & Betts,* (1939) 307 U.S. 241. By the same token, the questions raised by petitioners here go only to Molitor.

2.

A petition for rehearing was filed by petitioners and denied in a Memorandum by Judge Allen. A mo-

tion was then filed by National Latex and Akron Presform, asking that the case be reheard by the court *en banc* and that said motion be passed upon in the first instance by the court *en banc* or by a division of active judges thereof. This was denied in an Order signed by Judge Allen.

No designation or assignment of judges for the disposition of the motion was ever made or entered; Judge Allen was neither designated nor assigned to pass upon the motion.

Judge Allen's order states that it is a "rule long established and never deviated from by this Court" that in cases heard and decided by a regular division of three judges, "a petition to rehear and reconsider should not be considered by the Court *en banc.*" The Order then stated that the motion that the appeals be reheard *en banc* and that the motion be considered *en banc* "must be denied". In brief, although this Court said in the *Western Pacific Railroad Case,* (1953) 345 U. S. 247, that while a Court of Appeals may take steps to use the *en banc* power sparingly, "it may not take steps to curtail its use indiscriminately", the Court of Appeals for the Sixth Circuit has decided that it will never rehear any case *en banc.*

In the Order filed April 6, 1960 the court reiterated that the Petition for Rehearing *en banc* would not be entertained.

3.

The trial judge conceded that "working with plastics such as vinyl resins * * * was not new * * * with Molitor," but sustained the patent on the primary ground that Molitor's method "witnessed the first com-

mercially successful method and means for producing such articles in a substantial way and in greatly increased and substantial quantities."*

The majority opinion (written by Judge Allen) said:

"Appellant contends that the Molitor process consists merely of subjecting an old material to an old forming treatment and is not patentable.

"We bear in mind the ruling of the Supreme Court, *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, that the question of invention is a question of law. But here questions of fact exist which affect the conclusion of law. We are bound in patent cases by fact findings of the trial court which are not clearly wrong. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271. Here the facts as to the accomplishment of this Molitor process are clearly sustained by the record."

The recital of Molitor's "accomplishments" is startlingly similar to that contained in Judge Allen's majority opinion for the same Court of Appeals in *A. & P.*, 179 F. 2d 636.

Judge McAllister (who succeeded Judge Allen as Chief Judge of the Circuit) dissented. He concluded his opinion by saying:

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* The trial judge necessarily lumped Molitor and Martin together in order to reach this finding, because Molitor discloses no forming apparatus whatsoever; cf. *Altoona Publix Theatres v. Tri-Ergon Corp.*, (1935) 294 U.S. 477, 487.

"Molitor and Martin combined to accomplish the manufacture of excellent products in a single operation without damaged material or scrap, and reduced the time of operation from a day to fifteen minutes, with immense reduction of labor cost. In the years before the Supreme Court decision in the Great Atlantic and Pacific Tea Co. case, the determination of this court in the instant case would probably be unanimous, to sustain the judgment of the District Court. In the light of that decision, I am of the opinion that the patents are invalid."

4.

Vinyl resin is a "thermo-setting" plastic, i.e., it is brought to its final desired physical state by the application of heat.

Vinyl resin in its uncured state is a solid. It was an old practice to admix the powdered resin with a liquid plasticizer to form a creamy liquid, or "paste", which could be poured into a mold. The paste is called "vinyl plastisol". Heating of the cast material results in the vinyl resin absorbing the plasticizer, and thermo-setting follows.

The change of state from fluid to solid is gradual and progressive upon the application of heat. The first stage of solidification is called "gelling". When thermo-setting is completed, the material is said to be "fused".

Vinyl plastisols were exploited commercially by the B. F. Goodrich Company, which had a patent (now-expired) covering them (Tr. 237a). Plastisols were sold by Goodrich under the trade name "Geon Paste Resin".

The Goodrich Company's trade bulletins (Tr. 161a-169a) describing it were not known to the Patent Office Examiner nor were they disclosed to him by Molitor.

Molitor admittedly used one of the Geon resins (No. 100-X-210) without modification in all of his work. He first used it at Sun Rubber in the making of children's toys by a practice called "slush molding". That practice was in public use by Sun Rubber before any date of invention alleged by Molitor and more than a year prior to his filing date.

Slush molding is effected in a metal mold having an aperture into which the vinyl paste can be poured. The mold is revolved or agitated to insure complete contact of the plastisol with the mold walls and is completely filled. The filled mold is heated and gelling of the plastisol commences adjacent the inner surface of the mold and is progressively inwardly, so that a shell of semi-solidified plastisol soon forms inside the hot mold. The excess material is then poured out and the mold is subjected to sufficient additional heat to fuse the plastisol remaining in the mold. The mold is cooled and the completed hollow article is thereafter removed from it. Representative articles so made are illustrated in one of the Goodrich Bulletins (Tr. 168a).

5.

Molitor supplied nothing new in the chemistry or compounding of the plastisol or in the curing cycle for it. At most, he only subjected vinyl plastisol during the curing cycle to a forming treatment different from slush molding but also old in the art. Molitor resorted to so-called "rotational casting" in which a measured charge

of material is placed in a completely closed mold and the mold is then rotated simultaneously about diverse axes to distribute the material so as to form a shell within the mold; in brief, the procedure differs substantively from slush molding only in that there is no pouring-off of excess paste. The rotational casting technique is notoriously old (e.g., Tr. 177a, 185a, 195a, 203a).

6.

Rotational casting of vinyl plastisol is disclosed in the prior art Italian patent to Delacoste (261a). That patent was not known to the Patent Office Examiner who passed upon the Molitor application.

The trial judge held that Delacoste did not teach the heating of the deposited shell of plastisol to complete fusion but only to the point of gelling; that "temperature and timing" were the important elements in Molitor "which are not found, or obvious, in the earlier art"; and that Delacoste, being a foreign patent, must be disregarded because he did not disclose the practice in sufficient detail to enable the art "to practice the Delacoste method or process without experimentation * * *."

The claims of the Molitor patent itself state no details of "temperature and timing" and, as above stated, Molitor contributed nothing in this regard but merely followed the instruction supplied by the makers of the Geon resin which Sun Rubber had long been using in slush molding.

7.

The holding of the majority below that Molitor had made an invention was based in significant part upon a publication not of record, saying:

> "It is significant that a technical dictionary now defines slush molding in terms of the use of plastisol rather than rubber. *Modern Plastics Encyclopedia* (1959). This is one of the strongest indicia of invention. Plainly, when manufacturing concerns, practicing the art and competing with each other in the market, extensively replace one method for another, it is evidence of invention."

The so-called "Encyclopedia" appears to be no more than a self-styled "Encyclopedia Issue" of a trade magazine called "Modern Plastics". The publishers make no pretense that it is a learned treatise and many of the articles in it are clearly prompted by commercial interest.

In their petitions for rehearing, National Latex and Akron Presform urged that they had been denied due process by reason of the fact that the majority opinion had predicated its opinion on this publication without giving them any opportunity to discuss it or rebut it. The Memordandum denying the first petition did not touch on this matter beyond stating that the publication "may be found in the Cleveland Public Library". In the same Memorandum, Judge Allen cited still another publication not of record and put reliance upon it.

National Latex and Akron Presform thereupon raised the question of due process again in their second petition for rehearing. The Order denying the second petition utterly ignores it.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

**I. The writ should be granted for the purpose of more clearly defining the *en banc* powers under 28 USC § 46(c) and responsibilities of the Courts of Appeals in administering petitions for rehearing *en banc*.**

Since this Court's decision in the *Western Pacific Railroad Case, supra*, different Courts of Appeals have come to widely diverging, and in some cases conflicting, decisions, as to their *en banc* powers and responsibilities. Two questions in this area are presented by the instant petition.

(a) Petitioners challenge the right of a retired circuit judge to pass upon a motion for rehearing *en banc* as retired Judge Allen did in this case. The action of the lower court in this regard is in direct conflict with the majority decision in *G. H. Miller & Company v. United States*, (C. A. 7, 1958) 260 F. 2d 286, and with the minority decision in *United States v. Sentinel Fire Insurance Co.*, (C. A. 5, 1949) 178 F. 2d 217, 239.

Petitioners submit that the conflict should be resolved by this Court. The right of a retired circuit judge to participate in the decision of a rehearing *en banc* is now before this Court in *United States v. American-Foreign Steamship Corp.*, No. 138, October Term, 1959.

(b) In the *Western Pacific Railroad Case, supra*, this Court said, p. 261:

> "A court may take steps to use the *en banc* power sparingly, *but it may not take steps to curtail its use indiscriminately.*" [Emphasis supplied]

Despite this admonition, the Sixth Circuit has adopted and adheres to a policy of utter curtailment of the *en banc* power to rehear. It appears to have heard only one case (involving a charge of treason) *en banc* in all of its history; *Stephan v. United States,* (1943) 139 F.2d 1022. It appears *never* to have reheard or reconsidered a case *en banc.*

In the Order denying petitioner's motion that the case be reheard *en banc,* Judge Allen said:

> "A rule long established and never deviated from by this Court is that in cases heard and decided by a regular division of three judges, presenting similar motions for en banc proceedings, a petition to rehear and reconsider should not be considered by the Court en banc. *National Labor Relations Board v. Cambria Clay Products Co.,* 229 Fed. 2nd 433. *Northwest Airlines, Inc., v. Glenn L. Martin Co.,* 229 Fed. 2nd 434."

The Order then discussed the cited cases, and stated that the three judges who acted had been assigned to hear the original appeal and were therefore "regular" judges in the case until its final disposition. The Order then stated:

> "The motion that the appeals be reheard en banc, and that the motion be disposed of by the Court sitting en banc *must* be denied." [Emphasis supplied].

In its Order filed April 6, 1960, the court in discussing the Petition for Rehearing *en banc* said:

> "Appellants filed a second petition for rehearing February 2, 1960, which was held by the court not to be authorized by the statute nor by the rules of this court and was denied February [sic] 10, 1960."

The court, thus, reiterated that it will not grant petitions for rehearing *en banc*.

Petitioners recognize that the Courts of Appeals are vested with wide discretion under *Western Pacific*, in the disposition of motions for rehearing *en banc*. Petitioners submit, however, that the policy in the Sixth Circuit involves no element of discretion but simply forecloses rehearings *en banc* to all litigants contrary to the ruling of this Court in *Western Pacific*.

**II. The writ should be granted so that the effect of fact findings by the trial court upon the freedom of Courts of Appeals to apply criteria of patentable invention stated by this Court in *A. & P. v. Supermarket* may be clearly established.**

Chief Judge McAllister, who dissented below, deemed that Molitor did not meet the criteria of patentable invention laid down by the Court in the *A. & P.* case. The majority refused to apply those criteria on the ground that the appellate court was bound by fact findings made by the trial judge. The trial judge made no separate findings of fact; what he said in his opinion on this score was in reality nothing more than a statement of the "commercial success" — the achievement of manufacturing economies by more rapid production and a reduction in scrap loss. There is and can be no denial that in Molitor's use of the rotational casting scheme, old *per se*, he distributes plastisol within the mold in precisely the same way that other plastics had long been distributed and that the plastisol itself gels, and fuses, and is cooled in the mold, in accordance with

its inherent qualities, as was old in the art before Molitor. Surely, findings by the trial court that Molitor's scheme was commercially successful should not bar a Court of Appeals from holding invalid a patent which does not meet the criteria enounced in the *A. & P.* case.

The decision below is in outright conflict on this point with the decisions in other Courts of Appeals. We invite attention to the comprehensive concurring opinion of Chief Judge Hastings of the Seventh Circuit Court of Appeals in *Armour & Co.* v. *Wilson & Co.*, 124 USPQ 115 (not yet officially reported), which states the view of the Seventh Circuit on the matter and summarizes the rule enounced in numerous other circuits.

**III. The writ should be granted in order to settle the question whether the apposite provisions of the patent statute impose any higher or different requirements for disclosure in a prior art foreign patent than in a domestic one.**

The issue here revolves around the efficacy of the Delacoste Italian patent, *supra*, p. 11. Chief Judge McAllister was of the opinion that Molitor had made no patentable advance over Delacoste. The trial judge, affirmed by the majority in the Court of Appeals, rejected Delacoste on the ground that he did not disclose the scheme with such particularity as to enable a worker in the art to use it without some experimentation".*

---

* Since Molitor himself does little or no more than invite his readers to experiment until they find the most suitable conditions for the particular vinyl composition which they choose to employ, we have the absurd result that Delacoste is ignored as prior art, not because he teaches less than Molitor but because he does not teach more.

The view that a foreign reference must be construed "strictly" and must be rejected if experimentation is required in order to put it into effect was stated by this Court as early as 1870 in *Seymour v. Osborne,* 11 Wall. 516. That decision may now be an anachronism in view of the decisions of this Court in more recent cases, e.g., *Altoona Publix Theatres v. American Tri-Ergon Corp.,* (1935) 294 U.S. 477. The lower courts have commented at various times upon the incongruity of having one standard of disclosure for a prior domestic patent and another standard for a prior foreign patent; see, e.g., *Dewey & Almy Chemical Co. v. Mimex,* (C.A. 2, 1942) 124 F. 2d 986; *Van Der Horst Corporation v. Chromium Corporation,* (C.A. 2, 1952) 197 F. 2d 791; rehearing denied 198 F. 2d 748.

Sections 102 and 103 of the present statute (quoted, *supra,* p. 5) draw no distinction between domestic and foreign patents.

At least as respects Section 103, the majority opinion below is in direct conflict on this point with the rule stated by the Court of Appeals for the Tenth Circuit in *Hollywood-Maxwell Co. v. Street's of Tulsa,* (C. A. 10, 1950) 183 F. 2d 261.

**IV. The action of the majority below in predicating invention on a recent trade publication not of record, without particularization and without justification for citing it other than the court statement in the Memorandum denying rehearing, that it "may be found in the Cleveland Public Library", appears to petitioners to be a denial of due process.**

In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* (1937) 301 U.S. 292, 303, this Honorable Court said:

> "[It is] as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

The action of the lower court in this regard sets a precedent for patent cases which should be reviewed and rejected by this Court.

It has long been held that a court may, with caution, take judicial notice of "facts of universal notoriety" regarding the state of the art and protect the public against the imposition of an unlawful monopoly in the light thereof, *Brown v. Piper,* (1875) 91 U.S. 37. In the instant case, however, the majority below relied on recently published assertions unauthenticated and seemingly prompted by commercial interest to sustain the patent; cf. *Hazel-Atlas Co. v. Hartford Co.,* (1944) 322 U.S. 238, to the detriment of petitioners and the public generally.

## CONCLUSION

The petition presents questions whose resolution will resolve conflicts and uncertainties which have arisen in the lower federal courts and will have immediate importance far beyond the particular facts and parties involved. The petition should be granted.

Respectfully submitted,

WALTER J. BLENKO,
Attorney for Petitioners

WM. C. MCCOY
WM. C. MCCOY, JR.
ALBERT H. OLDHAM
FREDERICK B. ZIESENHEIM
Of Counsel.

April 11, 1960.